



Paper No. 5

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COPY MAILED**APR 24 2002****OFFICE OF PETITIONS**

In re Application of :
Walker, et al. :
Application No. 09/511,968 :
Filed: February 23, 2000 :
Attorney Docket No. WD2-96-082 :
DECISION ON PETITION

This is a decision on the "Petition to Request Acceptance of Filing Date", filed June 30, 2000¹, which is being treated as a Petition Under 37 CFR 1.53(e) to accord the above-identified application a filing date of February 23, 2000. The Office apologizes for the delay and inconvenience caused to applicant.

Application papers in the above-identified application were filed on February 23, 2000. However, on May 5, 2000, the Initial Patent Examination Division mailed a "Notice of Incomplete Nonprovisional Application," notifying applicant that the application papers had not been accorded a filing date because the application was deposited without a specification including at least one claim as prescribed by 35 USC 112². On June 30, 2000, applicant replied with the instant petition. However, this petition was mistakenly never entered as a "Notice of Termination of Proceedings Under 37 CFR 1.53(e)" was mailed on November 30, 2001.

The "Notice of Termination of Proceedings" is hereby **VACATED**.

Petitioner asserts, in essence, that the specification was among the papers filed on February 23, 2000, and submits a postcard receipt in evidence thereof. The postcard receipt identifies this application, lists "Continuation Patent Application - 34 pages" as enclosed, bears a United States Patent and Trademark Office date-stamp of February 23, 2000, and lacks any notation of non-receipt of any item listed.

However, petitioner's postcard receipt does not properly itemize the number of sheets of specification filed.³ Thus, petitioner's postcard receipt is not sufficient evidence to establish that the 34 pages submitted on petition were among the original application papers filed on February 23, 2000.

¹ Subsequently re-filed on January 9, 2002, and supplemented by a communication submitted via facsimile transmission on April 15, 2002.

² See 35 U.S.C. 111(a)(4).

³ See MPEP 503 at 500-15.

Nonetheless, petitioner's transmittal letter submitted with the application on February 23, 2000 states that the entire disclosure of the parent application was incorporated by reference into the instant continuation application. In addition, petitioner has included a statement attesting that the specification of the instant continuation application is a "true copy of the specification submitted for the parent case." In a continuation application filed under 1.53(b), an applicant may incorporate by reference the prior application by including, in the application-as-filed, a statement that such specifically enumerated prior application or applications are "hereby incorporated herein by reference." The inclusion of this incorporation by reference of the prior application(s) will permit an applicant to amend the continuing application to include any subject matter in such prior application(s), without the need for a petition. See MPEP 201.06(c).

Accordingly, the petition is **GRANTED**.

Given the basis for granting the petition, no petition fee has been charged.

When the "Notice of Termination of Proceedings" was mailed on November 20, 2001, applicant was refunded his filing fee of \$690, minus a handling fee of \$130. As the Notice was issued in error, applicant has been charged \$560 to represent the filing fee.

The file does not indicate a change of address has been submitted, although the address given on the petition differs from the address of record. If appropriate, a change of address should be filed in accordance with MPEP 601.03. A courtesy copy of this decision is being mailed to the address given on the petition; however, the Office will mail all future correspondence solely to the address of record.

This application is being forwarded to the Office of Initial Patent Examination (OIPE) for further processing with a filin g date of February 23, 2000, using the application papers received in the Office on that date and the specification resubmitted on petition filed June 30, 2000. Applicant will receive appropriate notifications regarding the fees owed, if any, and other information in due course from OIPE.

Telephone inquiries specific to this decision should be directed to Petitions Attorney Cliff Congo at (703) 305-0309.



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